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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

Nos. 48 and 64

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

vs.

ROOT REFINING COMPANY,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF ON BEHALF OF PETITIONER, UNIVERSAL OIL PRODUCTS COMPANY

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BRIEF ON BEHALF OF PETITIONER, UNIVERSAL OIL PRODUCTS COMPANY

THE DECISION AND OPINION BELOW

The opinion of the Circuit Court of Appeals, filed December 29, 1944, is reported in 147 F. (2d) 259 and is set forth at pages 385-91 of the record made upon the petition for writ of *certiorari* under Section 262 of the Judicial Code and at Volume IX, pages 3685-91 of the transcript of record filed in this Court with the petition for writ of *certiorari* under Section 240(a) of the Judicial Code. The

order of the Circuit Court of Appeals, dated December 29, 1944, is set forth in the record (C. R. p. 392-3; Tr. v. IX, p. 3692-3).*

JURISDICTION

This Court has jurisdiction under Section 262 of the Judicial Code, Act of March 3, 1911 (28 U. S. C. §377) and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. §347). Writs of *certiorari* were granted under both of the foregoing sections on April 23, 1945.

THE PETITIONER

Petitioner, Universal Oil Products Company (hereinafter sometimes referred to as "Universal"), is a corporation organized under the laws of Delaware, having its principal place of business at 310 South Michigan Avenue, Chicago 4, Illinois. All of the stock and other securities of the petitioner are now owned by Guaranty

*These cases are before this Court upon two records. One, a short record made upon the petition for a writ of *certiorari* under Section 262 of the Judicial Code, to which, for convenience, we shall hereafter refer as "C. R. p. ", and the other, a nine volume record (which by reference incorporates seven additional volumes on a previous application, 296 U. S. 626) filed in this Court with the petition for a writ of *certiorari* under Section 240(a) of the Judicial Code, to which, for convenience, we shall hereafter refer as "Tr. v. , p. ". All of the material contained in the short record is also contained in the complete record; we believe, however, that substantially all matters pertinent to the issues here presented are contained in the short record.

Trust Company of New York, as Trustee,* under the terms of a deed of trust, dated October 26, 1944, for the creation of "The Petroleum Research Fund", the present named beneficiary thereof being the American Chemical Society. The income received by the beneficiary is to be used exclusively for advanced scientific education and fundamental research in the petroleum field; every patent, United States or foreign, taken out by or on behalf of the beneficiary or by or on behalf of any individual or institution acting at the direction of or on behalf of the beneficiary in carrying out such research is to be immediately dedicated to the public, royalty free (C. R. p. 5-6).

SUMMARY STATEMENT OF THE CASE

The judges of the Circuit Court of Appeals for the Third Circuit, purporting to act as a Circuit Court of Appeals, have purported to assume jurisdiction, take certain action, and enter certain orders wholly beyond their power and authority.

The jurisdiction was sought to have been assumed, the action was taken, and the orders were entered, purportedly in a consolidated cause entitled *"Root Refining Company, Defendant-Appellant,* vs. *Universal Oil Products Company, Plaintiff-Appellee"*** (hereinafter sometimes re-

*Since the acquisition of petitioner's stock and other securities by Guaranty Trust Company of New York, the management of petitioner's business has been vested in a Board of Directors, wholly independent of and not beholden to any interests adverse to the purposes of the trust (C. R. p. 5-6). No present member of the Board of Directors of your petitioner was a director, officer or employee of your petitioner at any time prior to such acquisition.

**Heard and determined by the Court of Appeals for the Third Circuit in 1935 (78 F. (2d) 991), no member of which sat in the proceeding complained of.

ferred to as "the *Root* case"), and upon the applications of one or more attorneys-at-law, namely, the late Judge Arthur C. Denison and Messrs. J. Bernhard Thiess, Thorley von Holst and Arthur G. Logan (who described themselves as "*Amici Curiae*"* at the suggestion of Senior Circuit Judge Biggs [C.R. p. 53, 65-6; Tr. v. I, p. 14, 26]), none of whom at the time of the application was a party to, or the attorney for, or the representative of, any party to that cause; indeed, the *Root* case had been settled and had become wholly moot prior to the date upon which the attorneys' said applications were made. Prior to the taking of the action complained of, both patents involved in the *Root* case expired by lapse of time.

Nevertheless, as will hereinafter more fully appear, the aforesaid judges, purporting to act as a Circuit Court of Appeals, assumed jurisdiction upon the petition of these attorneys, entered an order, dated November 26, 1941 (C. R. p. 137-9; Tr. v., I, p. 94-6), appointing a Master to investigate and report with respect to whether certain judgments of the Court of Appeals in the *Root* case were tainted by fraud, confirmed the Master's report finding that they were, and directed that they be set aside and the appeals in the *Root* case be set down for reargument before the Circuit Court of Appeals for the Third Circuit, as then constituted (C. R. p. 358-9; Tr. v. IX, p. 3661-2). Upon the basis of the foregoing action, the judges entertained a petition by two of the foregoing attorneys, namely, Messrs. Thiess and von Holst, and entered an order, dated

*Arthur C. Denison died on May 27, 1942, and Arthur G. Logan's activities appear to have ceased on May 12, 1942. From and after the latter of these dates, *Amici Curiae* shall be deemed to refer only to Messrs. Thiess and von Holst unless otherwise indicated by the context.

December 29, 1944 (C. R. p. 392-3; Tr. v. IX, p. 3692-3), in response to that petition, allowing said attorneys the sum of $100,000 "as compensation for their services in the above entitled cause" and the sum of $54,606.57 as "expenses" therein and directing that the sum of $154,606.57, together with costs in the Circuit Court of Appeals, be "taxed against" petitioner.

The issues* before this Court are three-fold: *first*, whether the Circuit Court of Appeals had any jurisdiction in this proceeding to make any adjudication binding upon petitioner including the taxation of costs and other sums in favor of *Amici Curiae* pursuant to the order of December 29, 1944 directing that the sum of $154,606.57 be "taxed against Universal Oil Products Company together with the costs of the proceedings in this Court to set aside the judgments rendered by this Court in the above entitled causes on June 26, 1935"; and *second*, whether the conduct of the Master and the purported action of the Court of Appeals deprived petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States; *third*, whether the Court of Appeals, assuming its jurisdiction in the premises, was warranted in entering the order of December 29, 1944.

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*No issue is here presented as to whether or not the Master would have been justified, in a legally cognizable proceeding, which constituted a case or controversy within the meaning of Article III, Section 2 of the Constitution of the United States, in which adverse parties were appearing before a tribunal legally constituted and in which the established rules of evidence and other judicial proprieties were observed, in recommending that the *Root* judgments be set aside, or as to whether or not the Circuit Court of Appeals would have been justified in such a proceeding in confirming the Master's report, in adopting his findings of fact and conclusions of law and in setting aside the *Root* judgments.

STATEMENT OF FACTS

History of the *Root* case.

The *Root* case was a consolidation of two actions brought in 1929 and 1931, respectively, by petitioner's predecessor in interest against Root Refining Company (hereinafter referred to as "Root") in the United States District Court for the District of Delaware, alleging infringement by Root of two of petitioner's patents, namely, United States Letters Patent No. 1,392,629, Carbon P. Dubbs, granted October 4, 1921, and United States Letters Patent No. 1,573,593, Gustav Egloff, granted May 12, 1925.

The *Root* case came on for trial in the District Court in 1932 before Honorable John P. Nields, District Judge, who on April 27, 1934 rendered an opinion in favor of petitioner sustaining the validity of the Dubbs and Egloff patents and finding that both patents were infringed by the accused Winkler-Koch process* practiced by Root (6 F. Supp. 763). A decree directing an accounting and granting a permanent injunction was entered on that decision on May 18, 1934.

Appeals were taken by Root to the Circuit Court of Appeals for the Third Circuit and the cause was argued on January 7, 1935, before Circuit Judges Joseph Buffington, J. Warren Davis and J. Whitaker Thompson. That court unanimously affirmed the decree of the District Court on June 26, 1935, the opinion being written by Circuit Judge J. Warren Davis (78 F. [2d] 991). A petition for rehear-

*The Winkler-Koch process was a cracking process installed by the Winkler-Koch Engineering Company, and was used by Root and other refining companies represented by *Amici Curiae* for the purpose of refining petroleum.

ing was filed in the Court of Appeals and was denied on August 6, 1935 (78 F. [2d] 991). A petition for writ of *certiorari* was filed in this Court and was denied on October 21, 1935 (296 U. S. 626).

Settlement of the *Root* case.

Several years after the denial of *certiorari* by this Court, petitioner and Root entered into an agreement, settling as of April 1, 1939 the controversy between them involved in the *Root* case; by this agreement petitioner waived its rights to the accounting directed by the interlocutory decree and petitioner and Root entered into a license agreement, under which Root was granted the right to use certain of petitioner's patents for a stipulated royalty. This settlement fully and completely disposed of the controversy theretofore existing between petitioner and Root, although no order dismissing the bill or vacating the injunction was entered.

***Amici Curiae* and Their Clients.**

Three of *Amici Curiae*, Messrs. Denison, Thiess and von Holst, who had been counsel of record for Root in the *Root* case prior to its settlement, were also counsel for several other oil refining companies, including those upon whose behalf *Amici Curiae* now purport to appear. Subsequent to the institution of the *Root* case, petitioner also commenced suits against these corporate clients of *Amici Curiae* in various United States district courts alleging the infringement by each of them of both the Dubbs and Egloff patents. These defendants were all members of a self-styled "patent club", which had been organized by Winkler-Koch Engineering Company and the users of its process to defend these infringement suits. The compensation and

expenses of *Amici Curiae* in the defense of those suits and in the instant proceeding were paid out of a common defense fund to which all of the members of the patent club contributed (Tr. v. IV, p. 1494-6). In one of these actions, namely, *Universal Oil Products Co. v. Globe Oil & Refining Co.*,* a suit brought in the United States District Court for the Eastern District of Illinois, a preliminary hearing was held on the issue of whether, upon proof of the fact that the patent club had controlled the conduct of the defense in the *Root* case, the decree entered therein was *res adjudicata* and binding upon Globe Oil & Refining Company. The District Court held that it was *res adjudicata* (27 F. Supp. 161). After the settlement of the *Root* case, however, the District Court, upon a rehearing, held that the settlement deprived the other alleged infringers of the right to a review after final judgment of the issues of validity and infringement and that the *Root* decree was no longer binding (31 F. Supp. 665). It is on behalf of certain of these other alleged infringers that *Amici Curiae* now claim the right to appear in this proceeding.**

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*This Court has recently held that, assuming the validity of the Dubbs patent, it was not infringed by the Winkler-Koch process practiced by Globe Oil & Refining Company and that the Egloff patent was invalid (*Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471).

**While *Amici Curiae* have from time to time stated that they represented certain of these clients (C. R. p. 39-40, 51-2; Tr. v. I, p. 2-3, 13), they never filed a formal appearance or signed any brief or other document in which they formally purported to appear on behalf of their clients until they filed a brief in this Court in opposition to the petition for writ of *certiorari*. In that brief and in their motion for leave to file a brief and argue orally before this Court, Messrs. Thiess and von Holst now purport to appear "*pro se*, and on behalf of" six specified refining companies.

The Institution of the Present Investigation.

Under date of June 2, 1941, Messrs. Denison, Thiess and von Holst, who, as we have seen, had been attorneys of record for Root in the *Root* case and who were then representing other refining companies using the Winkler-Koch process, against each of which suit had been brought by petitioner for infringement of its Dubbs and Egloff patents, addressed the following letter to Thomas G. Haight, William F. Hall, Charles M. Thomas and Hugh M. Morris, counsel of record for petitioner in the *Root* case (C. R. p. p. 39-40; Tr., v. I, p. 2-3):

"Gentlemen:

"Please be advised that on Thursday, June 5, 1941, at 3:30 P.M., Daylight Saving Time, we shall appear before the Judges of the Court of Appeals for the Third Circuit at Philadelphia, Pennsylvania, either in chambers or in the courtroom, as the Court may direct, and shall present to the Court the question of whether or not an *investigation** should be directed, in such manner as the Court may see fit, into the circumstances concerning the appeals in the cases entitled *Root Refining Company* v. *Universal Oil Products Company*, Appeals Nos. 5648 and 5546, and the connection of Morgan S. Kaufman therewith, all as partially developed in the testimony taken in the case of *United States of America* v. *J. Warren Davis and Morgan S. Kaufman*,** recently

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*All italics are supplied unless otherwise noted.

**In 1941, federal grand jury proceedings resulted in the indictment in the Eastern District of Pennsylvania of William Fox, the former motion picture magnate, former Circuit Judge J. Warren Davis and one Morgan S. Kaufman, a Scranton, Pennsylvania, lawyer, charging an illegal conspiracy to obstruct justice in connection with William Fox's personal bankruptcy

on trial in the United States District Court for the Eastern District of Pennsylvania.

"Our appearance before the Court will be on behalf of certain companies, including Globe Oil & Refining Company and Skelly Oil Company, against whom the decision in the said case of *Root Refining Company* v. *Universal Oil Products Company* is being asserted as *res judicata* and as a judicial precedent.

"You are invited to attend if you see fit.

[Signed] ARTHUR C. DENISON,
J. BERNHARD THIESS,
THORLEY VON HOLST."

Pursuant to that letter, petitioner's said counsel of record appeared in the courtroom of the Circuit Court of Appeals for the Third Circuit at the time and place named; upon the bench were all of the then active Circuit Judges for the Third Circuit.* Presumably, Messrs. Denison,

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proceedings which had been instituted within the Third Circuit in 1936. William Fox pleaded guilty. Davis and Kaufman were tried twice, the jury upon each occasion disagreed and after the second trial the Government entered a *nol. pros.* At the first trial of Kaufman and Davis, testimony was adduced from which it appeared that Morgan S. Kaufman had been retained by petitioner in 1932; that he was paid in the fall of 1935 by petitioner the sum of $25,000 as a general retainer for the years 1932, 1933, 1934 and a part of 1935; that Kaufman was not an attorney of record in the *Root* case and was not active in that case; and that, shortly after he had been paid by petitioner, Kaufman loaned the sum of $10,000 to a cousin of Judge J. Warren Davis upon the security of a mortgage upon certain Florida real estate (C. R. p. 47-9; Tr. v. I, p. 9-11), which *Amici Curiae* have conceded to have been adequate (Tr. v. III, p. 948-9).

*These were the Honorable John Biggs, Jr., Albert Branson Maris, William Clark, Charles Alvin Jones, and Herbert F. Goodrich.

Thiess and von Holst had previously arranged for the hearing, inasmuch as the proceedings were opened by Judge Denison as follows (C. R. p. 3); Tr. v. I, p. 2):

> "Mr. Denison: At Your Honors' suggestion, I will read the letter which is the only present basis of this application."

Thereupon Judge Denison read the above-quoted letter as an introduction to his further remarks.

After recounting the history of the *Root* litigation, Judge Denison described the settlement between petitioner and Root and stated that that settlement had "*completely disposed of the controversy*" and that "*the [Root] case had become moot*" (C. R. p. 43; Tr. v. I, p. 6). He then described the legal position of himself and his co-applicants, as follows (C. R. p. 45, 46-7; Tr. v. I, p. 7-8, 9):

> "Now, I should explain a little more fully the situation of the counsel here today who signed this letter. We were counsel for the defendant in the Root case. In a nominal way perhaps we still are. *But Root and Mr. Hamilton representing the Root Company settled that case and they have no further intvrest in it at present.*
>
> "I may properly say that on consultation with Mr. Hamilton, he said that in view of the present contract he has with the plaintiff which in many respects is a desirable contract, he doesn't feel at liberty to his stockholders to ask to have that contract of settlement set aside.
>
> * * * * *
>
> "*While we do not represent the Root Company in making this suggestion today*, we do represent some of these other people defendants as to whom it is claimed that the decree in the Root case is an

> adjudication, so that these other defendants can no longer deny either the validity or the infringement of the patent."

Although Judge Denison pointed out that petitioner was claiming that the *Root* judgments were *res adjudicata* as to his clients, he repudiated the validity of that claim, stating (C. R. p. 52; Tr. v. I, p. 14):

> "* * * we have always denied and we do deny that there was that participation by them in the Root cases that made them really parties, and *we can't come in and say they were parties.*"

Judge Biggs inquired whether Judge Denison and his confreres were making an application to the court, to which Judge Denison replied (C. R. p. 51-2; Tr. v. I, p. 13):

> "The frank answer to Your Honor's question is I don't know just what should be done. *The Root case itself, has been settled.* As counsel for the Root Company we can't do anything. As counsel for these other companies against whom the thing is alleged to be an adjudication and which other companies the plaintiff claims were really defendants in this case—as representing those companies we could file a formal application, I suppose."*

In order to bring the matter to a head, counsel for petitioner then offered to consent, on its behalf, to a reargument of the *Root* case on the merits before the Court of Appeals as then constituted,** provided Root would appear

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*They never formally intervened or otherwise submitted themselves to the jurisdiction of the Circuit Court of Appeals.

**At that time, each of the Circuit Judges for the Third Circuit who were in office in 1935 had either retired or resigned.

and reargue. Mr. von Holst responded to this offer as follows (C.R. p. 65; Tr. v. I, p. 25-6):

> "On the question of re-argument in so far as it bears on the Root situation, I was in conference with Mr. Hamilton of the Root Company lately, and they settled their litigation after long years of costly litigation, and their position, of course, is that they would not want to jeopardize their present position.
>
> "In other words, the Root Company would not for a moment consent to throw ing the whole thing open again and taking their chances on a new adjudication where they might win or they might lose, and I did not understand Judge Haight's offer of a re-argument to include a statement if the decision went against Root again, that then Root would be secure in the settlement which they made in 1939, and, of course—"

Petitioner was willing even to guarantee to Root the same advantageous settlement it was already enjoying, for petitioner's counsel interjected (*ibid.*):

> "Mr. Haight: We will give them that."

Even this offer, the acceptance of which might have resulted in the restoration of a justiciable controversy between Root and petitioner, came to naught, for *Amicus* von Holst responded (*ibid.*):

> "Mr. von Holst: With that understanding, of course, the situation is changed to that extent. My only position on that would be that *there is no counsel present here authorized to speak on behalf of Root at this time in response to Judge Haight's offer.* Otherwise, I don't change or modify anything that has been said heretofore, *because we do not, as we*

made plain in the opening, represent the Root Company before Your Honors."

At the conclusion of the hearing, Judge Biggs observed (C.R. p. 67; Tr. v. I, p. 27):

> "We think, Judge Denison, that you should embody in a written motion or a petition so that it may be formally on the records of this Court whatever relief it is that you seek, or what you desire by way of prayer or motion to have this Court do, and then the other side of the controversy may make an appropriate reply, and the whole matter may be one of record in which the Court may determine the issue."

Pursuant to this suggestion, Messrs. Denison, Thiess and von Holst filed, under date of June 18, 1941, a written petition as *Amici Curiae** (C.R. p. 68-86; Tr. v. I, p. 29-46) and a brief in support thereof (C.R. p. 87-95; Tr. v. I, p. 47-54) to which petitioner responded.

Order of November 26, 1941.

Under date of November 26, 1941, the judges, purporting to act as the Circuit Court of Appeals for the Third Circuit, entered, upon the application of *Amici*

*Under date of June 25, 1941, one Arthur G. Logan, another of the counsel of record for Root in the *Root* case until the time of the execution of the aforementioned settlement agreement and who was then attorney for Eastern States Petroleum Co., Inc., another licensee of your petitioner, filed a petition as *Amicus Curiae*, in which, after setting forth, among other things, the alleged interest of Eastern States Petroleum Co., Inc., he joined in the prayers set forth in the petition of Messrs. Denison, Thiess and von Holst (C. R. p. 96-101; Tr. v. I, p. 55-60). Mr. Logan did not participate in the investigation after May 12, 1942, the date of the first hearing before the Master at which any testimony was taken.

Curiae, an order (C.R. p. 137-9; Tr. v. I, p. 94-6) captioned in the *Root* case, in which Thomas Raeburn White, Esq., was appointed Master,

> "with authority *to examine, investigate and to make and report to this court his findings and conclusions* concerning the relationship and dealings, if any, between Universal Oil Products Company, the plaintiff-appellee above named, Morgan S. Kaufman, and former Circuit Judge J. Warren Davis, and any and all persons acting for or on behalf of any of them in connection with the above entitled causes and the entire subject matter of the prosecution and disposition of the said causes and in particular whether there was in connection therewith such fraud, corruption, obstruction or distortion of justice as tainted and invalidated the judgments rendered by this court in the above entitled causes on June 26, 1935."

The order directed the Master (C. R. p. 138; Tr. v. I, p. 95),

> "to request the Department of Justice to make available to him as an officer of this court the records, documents and other evidence in the possession of such Department, whether developed by its Bureau of Investigation in its inquiries, or by the prosecuting attorneys of the Department in grand jury inquiries, or otherwise, bearing upon the matters hereby referred to him, and also to request (if such request be necessary) the Attorney General of the United States or the United States District Courts in which the said grand jury proceedings in the Cities of New York and Philadelphia took place, to make available to him as an officer of this court a stenographic transcript of the said proceedings."

The Investigation Conducted by the Master.

At the first hearing before the Master, on December 11, 1941 (C. R. p. 140-4; Tr. v. I, p. 97-101), no testimony was taken, but the Master advised counsel that he would endeavor to obtain access to the records described in the order of November 26, 1941.

Pursuant to the purported authority contained in this order, the Master, on his own itiative, personally examined all of the records in the possession of the United States Attorney for the Southern District of New York, including, among others, the report of an investigator of the Federal Bureau of Investigation, bank records, statements made by Judge Davis' cousin, the latter's son, and Judge Davis himself; also written statements prepared and submitted to the United States Attorney by Davis, his wife and his counsel, the grand jury testimony of Davis and Kaufman, and "many other reports and statements" (C. R. p. 152-6; Tr. v. I, p. 109-13),—all for the purpose of ascertaining if anything was contained in them which, he thought, might throw light upon the matters then under investigation. The Master made extracts of "all matters *which seem to me to be material to the present investigation*" (C. R. p. 156; Tr. v. I, p. 113).

Upon the conclusion of his independent investigation, and in advance of the second hearing, the Master submitted for the examination of *Amici Curiae* and counsel for petitioner such of the material which he had examined as he believed "might throw any light upon the issues raised in the present investigation" (C. R. p. 152; Tr. v. I, p. 109).

At the second hearing, on April 16, 1942, the Master read into the record a list and description of the documents,

records, grand jury testimony, F. B. I. reports and other writings which he had submitted to *Amici Curiae* and counsel for petitioner; it appears from the record that he had submitted only a portion of the material which he had examined (C. R. p. 145-84; Tr. v. I, p. 102-39).

At the same hearing, the Master advised *Amici Curiae* and counsel for petitioner that he had (C. R. p. 156; Tr. v. I, p. 113-4),

> "procured a copy of the record of the Grand Jury sitting in Philadelphia which investigated the affairs of Judge Davis and Mr. Kaufman, but I have not yet had an opportunity to examine it. *I have agreed with Judge Biggs that I would examine this record, and if I found anything in it material to the present inquiry it should be used in this proceeding. If I find nothing which seems to me to have a bearing on the issues presented in this investigation, I will return the record to the proper parties.*"

Following the Master's description of his own investigation and what he proposed to do with respect to grand jury proceedings in Philadelphia, an application was made by *Amici Curiae* for the issuance of subpoenas *duces tecum* (C. R. p. 157-63; Tr. v. I, p. 114-21).

In the course of an ensuing discussion of the powers of the Court of Appeals and of the Master and of the purposes of the order of November 26, 1941, counsel for petitioner made clear his understanding of the nature of the proceeding (C. R. p. 164-6; Tr. v. I, p. 121-3):

> "Mr. Harris: We construe the order of the Circuit Court of Appeals referring the matter to you, which order was dated November 26, 1942 [*sic*], as having for its primary purpose an investigation by

the Court looking toward the vindication of the honor of the Court, or otherwise, as the case might be. Otherwise, as it seems to us, Your Honor is not a Master in a litigation but an investigator for the purpose of advising the Court of his conclusions and findings.

"We welcome such an investigation. We will cooperate to the extent of our abilities, and wish to have the investigation as wide as possible.

"To the extent that the amici curiae are really litigants, or to the extent that any finding by His Honor or by the Circuit Court of Appeals might affect property or other rights of Universal Oil Products Company, or in any wise affect the merits of the two Root cases, * * * we feel we should be somewhat derelict in our duties to our client if we did not make upon the record an objection to the jurisdiction of the Circuit Court of Appeals, and, consequently, of Your Honor, to hear and determine in a summary and informal manner, and in a proceeding which doesn't amount to a controversy or suit prescribed by the Constitution of the United States, matters which affect or might affect property rights of our client and a judgment in its favor in the Court in this circuit.

* * * * * * *

"That there are not now before the Court or the Special Master any adverse parties so that any case or controversy can be said to exist.

"That there is not now before the Special Master any justiciable controversy over which the Circuit Court of Appeals or the Special Master has jurisdiction.

"That the persons designated in the order of the Circuit Court of Appeals herein as friends of the Court are not adverse parties technically, and have no standing as adverse parties in the cases of Root

Refining Company, Defendant-Appellant against Universal Oil Products Company, Plaintiff-Appellee, Nos. 5546 and 5648."

After making this general objection, counsel for petitioner, addressing himself to the non-judicial procedure adopted by the Master, in so far as the proceedings might be claimed to furnish a basis for any adjudication binding upon your petitioner or which might affect its property rights or judgments, stated (C. R. p. 166-7; Tr. v. I, p. 123-4):

"Mr. Harris: Now that our objections may be said to have substance, I should point out that under the order, I take it Your Honor may make your own investigation, may consider proceedings before the Grand Jury both in New York and here, and may make such further and other investigation as to Your Honor seems proper. I think that is entirely proper in such a proceeding, to inquire into the honor of those previously sitting on this Court.

"However, if it were to involve any property rights of our clients, including the validity of any judgment, then, of course, none of this evidence would be admissible in a plenary action. We would have a right to require it to be sworn to and delivered in open court with an opportunity for cross-examination, and all the rights which litigants are guaranteed in a controversy or case under the Constitution of the United States."

Later in the same discussion and preceding the taking of any testimony, the Master expressed his understanding of the proceeding before him when he stated (C. R. p. 177; Tr. v. I, p. 133):

"The Master: Well, I think as realists we must recognize, of course, that you gentlemen on either

side have private interests that you are serving as well as the public interest.

"On the other hand, the primary interest of the Court, I think, was public interest to make sure that its decision in this case had been, as it said, not tainted with fraud.

"I do not think that the investigation—for that is all it is—should be conducted strictly according to the rules of evidence in litigation."

These extended colloquies appeared to make crystal clear that it was understood that the proceeding related solely to the probity of the members and officers of the court, and that the proceeding was only—to quote the Master—an "investigation", not a case or controversy under the Constitution.

Commencing on the 12th day of May, 1942, and continuing from time to time thereafter until April 2, 1943, hearings were held before the Master, at which witnesses, called exclusively by *Amici Curiae*, were interrogated and numerous exhibits offered and received in evidence.

As the informality of the procedure adopted by the Master became more striking, counsel for petitioner took occasion again to urge petitioner's position upon the Master, saying (Tr. v. 1, p. 250):

"Mr. Harris: With the understanding previously noted, which I understand holds good all through the hearing without further notation, that while we welcome this informal method of producing proof for the purpose of an investigation of the probity of the Court, we do not recognize it as binding on Universal Oil Products Company in so far as it may affect any rights or property it may have. This is not a proper proceeding for that.

"Mr. Thiess: There has been a general exception to this on the record at the present time.

"The Master: *That is understood.*"

Subsequently, and in spite of counsel's continuing exception, a transcript of much of the testimony adduced in the criminal trials entitled "*United States of America* v. *J. Warren Davis and Morgan S. Kaufman*" (which the Master had presumably already perused in its entirety) was received in evidence, as was a transcript of the testimony given by various witnesses, including a part of the testimony of the Honorable John Biggs, Jr., Senior Circuit Judge, before federal grand juries either in New York or in Philadelphia.

After all hearings before him had been concluded, the Master caused to be filed as a part of the record, a memorandum (C.R. p. 185-250; Tr. v. VI, p. 2240-2306) describing in some detail certain of the documents which he had examined in the office of the United States Attorney for the Southern District of New York and setting forth extracts from the testimony of Morgan S. Kaufman and J. Warren Davis before the federal grand jury there. These extracts were interspersed with running comments of the Master. Though not a part of that memorandum, the Master also caused to be included in the record of the investigation, the testimony of Judge Davis' cousin before the federal grand jury in New York (Tr. v. VI, p. 2306-2487).

After a consideration, not only of the testimony adduced but presumably of the information which he had acquired by his own private investigation, the Master, over the objection of petitioner that the investigation did not constitute a case or controversy within the meaning of Article III, Sec-

tion 2 of the Constitution, rendered a report (C.R. p. 251-342; Tr. v. VIII, p. 3516-3600), in which, solely upon the basis of conjecture and inference and in the absence of any showing that petitioner had any connection with or knowledge even of the loan by Kaufman to Judge Davis' cousin (which constituted the alleged bribery by Kaufman of Judge Davis), he concluded (C.R. p. 288; Tr. v. VIII, p. 3550):

> "Upon the whole record I am forced to the conclusion that there was in connection with this case such fraud as tainted and invalidated the judgments rendered by this court therein on June 26, 1935."

Under date of November 20, 1943; petitioner filed appropriate objections and exceptions to the Master's report, including an objection to the jurisdiction of the Court of Appeals and the Master (Tr. v. VIII, p. 3615-37).

After oral argument and the submission of briefs upon the question of the confirmation or rejection of the report of the Master, the Court of Appeals, on June 15, 1944,* entered an order, captioned in the *Root* case, which provided, in part, as follows (C.R. p. 359; Tr. v. IX, p. 3662):

> "Upon consideration thereof the Court hereby dismisses the exceptions and adopts the findings of fact and conclusions of law of the Special Master as the findings of fact and conclusions of law of the Court.
>
> "And it is ordered that the judgments of this Court in the above entitled causes entered on June 26, 1935 be and the same are hereby vacated and that the mandates issued on October 30, 1935 to the

*Consisting of Judges Biggs, Maris, Jones, Goodrich and McLaughlin.

> District Court be recalled. *The Clerk is directed thereupon to restore the causes to the argument list for reargument.*"

We respectfully submit that nothing transpiring in the proceeding before the Master should have put petitioner on notice that it should insist upon a hearing before a master, who had not previously had access to sources of material not available to petitioner, or that it should insist upon strict proof in accordance with the law of evidence, until the Master in his report refused to find that no case or controversy under the Constitution existed (C. R. p. 338-9; Tr. v. VIII, p. 3596). Upon the argument before the Circuit Court of Appeals, petitioner's counsel consented that the judgments be set aside, not on the ground that any fraud had been proved, but solely on the ground that petitioner did not desire any judgments in its favor concerning which even the slightest suggestion of impropriety could be made. Even though the Circuit Court of Appeals overruled all of petitioner's exceptions to the Master's findings of fact and conclusions of law, the order of the Circuit Court of Appeals merely vacated its prior judgments, recalled its mandates and directed the clerk to place the appeals upon the argument list for reargument. This was in full accord with petitioner's wishes as evinced from the outset of the proceedings on June 5, 1941, when its chief counsel, the late Thomas G. Haight, said (C. R. p. 57-8; Tr. v. I, p. 19):

> "We are willing and we offer to let Your Honors take the record in this case, the briefs with oral argument or not, as you see fit, and determine whether this case was properly decided or whether it was not properly decided. We raise no technical objection and will raise none.

> "If it was properly decided, then we ought to have the benefit of it. If it was improperly decided, then the other side ought to have it. I make that offer with a full realization, which I think Your Honors will appreciate, that the attitude of this Court as presently constituted is far less liberal in its treatment of patents than the attitude of your predecessors, but I make it notwithstanding that because we believe that this was—it has expired nearly three years ago, the patent—the patent we believe covered a great invention and one that should receive protection."

The foregoing decision of the Court of Appeals therefore led the petitioner to believe that the court had determined to take no action against petitioner other than that to which petitioner had consented, namely, a reargument of the appeals. When, however, the Court of Appeals made its order on December 29, 1944, directing petitioner to pay $134,606.57 to *Amici Curiae*, it became apparent that, in spite of petitioner's protestations from the beginning that it acquiesced in the extra-judicial activities of the Master and in a proceeding without duly constituted adversary parties only upon the theory of an investigation of the probity of members and officers of the court, the proceeding was to be used explicitly for the purpose of unlawfully invading petitioner's property and of condemning it without a fair trial and without the due process guaranteed by the Constitution. That this was the intentional purpose of the judges of the Court of Appeals is made abundantly clear by a letter from the Clerk of that court in which he stated that the court felt it might be appropriate "to direct the court below to dismiss the complaints on the ground that the plaintiff came into this court with unclean hands." This

latter action has, we understand, been postponed until the determination of the issues now before this Court.*

Application of *Amici Curiae* for Fees and Disbursements.

On or about July 24, 1944, J. Bernhard Thiess and Thorley von Holst, as *Amici Curiae*, made an application to the Circuit Court of Appeals, captioned in the *Root* case for an order directing (C. R. p. 360-1; Tr. v. IX, p. 3663-4):

> "1. That the expenses and compensation of Thomas Raeburn White, Special Master, acting under the Order of this Court entered November 26, 1941, paid by the *Amici Curiae* in the first instance and allowed to the Master by the Order of this Court entered December 14, 1943, be taxed against Universal Oil Products Company and in favor of said *Amici Curiae* in the amount of $28,481.91.
>
> "2. That the costs and disbursements paid by the said *Amici Curiae* during the course of the investigation by the Master under the Order of No-

*In its petition for writ of *certiorari* under Section 262 of the Judicial Code (p. 30-1) and in its petition for writ of *certiorari* under Section 240(a) (p. 26-7), petitioner called this Court's attention to an action pending in the Third Circuit, entitled "*Universal Oil Products Company* v. *Skelly Oil Company*". Reference was there made to an application made to the Court of Appeals and, upon the denial of relief sought, to an application made to the District Court where, it was recited, the Honorable John Biggs, Jr. was sitting. Lest the infirmity of petitioner's language be construed to suggest that Judge Biggs sat upon the application in the Court of Appeals, we wish to make it abundantly clear that the contrary was true; Judge Biggs not only did not sit upon the application in the Court of Appeals but had had the case in another aspect pending before him in the District Court for more than a year prior to the application to the Court of Appeals.

vember 26, 1941, be taxed against Universal Oil Products Company and in favor of said *Amici Curiae* in the amount of $15,488.20.*.

"3. That the other and additional expenses incurred by the *Amici Curiae* during the course of the said investigation be taxed against Universal Oil Products Company and in favor of said *Amici Curiae* in the amount of $11,997.87, or such part thereof as the Court may deem proper.

"4. That a reasonable attorney's fee on account of the services of the said *Amici Curiae* and of counsel associated with them during the course of the said investigation be taxed against Universal Oil Products Company and in favor of said *Amici Curiae*.

"5. That the Court set a day certain for the hearing of this Motion."

Upon the return of the motion, *Amici Curiae* stated that they had received from certain of their corporate clients, *not including Root*, the expenses, costs, disbursements and counsel fees, which were the subject of their motion, and that such fees, costs and allowances as might be granted to them would serve to reimburse their clients for such expenditures.

*The costs, disbursements and expenses in paragraphs 2 and 3, totaling $27,486.07, are not the usual statutory costs and disbursements granted to litigants. They include traveling expenses of *Amici Curiae* (other than for attending hearings before the Master in this investigation), fees to correspondent lawyers, accountants, investigators and other experts, employed in several instances to investigate facts never presented to the Master. A substantial part of these costs and disbursements included, for example, the expenses of *Amici Curiae* in attending the criminal trials of Judge Davis and of obtaining a transcript of the disciplinary proceedings against Morgan S. Kaufman.

Upon the oral argument of the motion and in their briefs in opposition thereto, counsel for petitioner again challenged the jurisdiction of the Court of Appeals to act in the premises and to enter any judgment against petitioner in favor of *Amici Curiae* or their clients, upon the ground that the proceedings, while captioned in the consolidated cause entitled *"Root Refining Company, Defendant-Appellant*, vs. *Universal Oil Products Company, Plaintiff-Appellee"*, did not constitute a "case" or "controversy" within the meaning of Article III, Sections 1 and 2 of the Constitution of the United States; that there were no adverse parties and no justiciable controversy before the court; that the above entitled cause was moot; and that the Circuit Court of Appeals not only had no power to award to *Amici Curiae* any of the expenses, costs, disbursements and counsel fees, but that, even if it had the power to do so, the allowance of the same was unwarranted.

On December 29, 1944, the judges of the Court of Appeals handed down opinions granting the motion of *Amici Curiae*, with the exception of a small item of $1,361.41 representing expenditures made by *Amici Curiae* prior to the date of the order appointing the Master (C.R. p. 385-91; Tr. v. IX, p. 3685-91). The majority (Judges Biggs, Goodrich and McLaughlin) held that (C.R. p. 389; Tr. v. IX, p. 3689; 147 F. (2d) 259, 261):

> "Accordingly *amici* and their associates will be allowed the sum of $100,000 as their reasonable compensation and the amount of $54,606.57 as reimbursement for their out-of-pocket expenses."*

*The minority (Judges Jones and Maris) held that the allowance to *Amici Curiae* as compensation for their services in the investigation should be limited to an amount equal to the fee paid the Special Master, namely, $25,000 (C. R. p. 389-91; Tr. v. IX, p. 3689-91; 147 F. (2d) 259, 262).

By order, dated December 29, 1944, the Court of Appeals directed "that the sum of $154,606.57 be and the same hereby is taxed against Universal Oil Products Company together with the costs of the proceedings in this Court to set aside the judgments rendered by this Court in the above entitled causes [the *Root* case] on June 26, 1935" (C.R. p. 392-3; Tr. v. IX, p. 3692-3).

On January 17, 1945, the Clerk of the Court of Appeals advised counsel for petitioner by letter that "the Court directs me to say that the Amici in these cases [the *Root* case] have presented a motion and an order to the court and a form of mandate by which it is proposed that the decrees of the court below be reversed and the bills of complaint dismissed on the ground that the controversy has become moot. *The court entertains some doubt as to this course and feels that it might be appropriate to direct the court below to dismiss the complaints on the ground that the plaintiff came into this court with unclean hands.*"

SPECIFICATION OF ERRORS

The errors assigned appear at pages 3 and 4 of the brief filed on behalf of petitioner in support of its petition for writ of *certiorari* under Section 262 of the Judicial Code, and at pages 34 and 35 of the brief filed in support of the petition for writ of *certiorari* under Section 240(a) of the Judicial Code. The errors assigned in each case are identical and each of them is relied upon.

POINT I

THE COURT OF APPEALS LACKED JURISDICTION TO TAKE THE ACTION COMPLAINED OF.

The Court of Appeals, like all federal courts created under or pursuant to Article III, Section 1 of the Constitution, is limited in the exercise of its judicial power by Section 2 thereof to cases and controversies as to those terms have been defined by the cases. *Old Colony Tr. Co.* v. *Comm'r Int. Rev.*, 279 U. S. 716; *Ex parte Bakelite Corp'n*, 279 U. S. 438; *Muskrat* v. *United States*, 219 U. S. 346; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70.

Federal courts have, from their earliest history, "consistently declined to exercise any powers other than those which are strictly judicial in their nature." *Muskrat* v. *United States, supra.* Thus, a federal court is capable of exercising its judicial power only with respect to a justiciable controversy. *Osborn* v. *U. S. Bank*, 9 Wheat. 738; *Muskrat* v. *United States, supra.* It is axiomatic that an actual, as opposed to a hypothetical, controversy must exist before there can be said to be a justiciable controversy. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227; *Willing* v. *Chicago Auditorium*, 277 U. S. 274; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70; *New Jersey* v. *Sargent*, 269 U. S. 328.

Mr. Chief Justice Hughes, speaking for this Court in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, described the jurisdiction of the federal courts as follows (p. 239-41):

> "The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' The term "con-

> troversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." Per Mr. Justice Field in *In re Pacific Railway Comm'n*, 32 Fed. 241, 255, citing *Chisholm* v. *Georgia*, 2 Dall. 419, 431, 432. See *Muskrat* v. *United States*, 219 U. S. 346, 356, 357; *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 723, 724. * * *
>
> "A 'controversy' in this sense must be one that is appropriate for judicial determination. *Osborn* v. *United States Bank*, 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, 301; *Fairchild* v. *Hughes*, 258 U. S. 126, 129; *Massachusetts* v. *Mellon*, 262 U. S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

An absolute *sine qua non* of an actual controversy is the initial and continued existence of adverse parties asserting adverse interests. *Muskrat* v. *United States*, 219 U. S. 346; *Lord* v. *Veazie*, 8 How. 251; *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300; *Cleveland* v. *Chamberlain*, 1 Black 419.

The investigation ordered by the Circuit Court of Appeals and conducted by the Master, examined in the light of the many criteria established by the decisions of this Court, falls far short of a constitutional "case" or "controversy".

An examination of the record establishes that, as of the date when the Court of Appeals purported to assume jurisdiction in this proceeding and for some time prior thereto, no actual controversy between adverse parties existed in the *Root* case.*

(a) There was no existing controversy in the *Root* case between Root and petitioner, the original parties thereto. That controversy had been completely disposed of by the settlement in 1939 (p. 7, *supra*). *Amici Curiae* recognized this; at the initial hearing before the Court of Appeals, Judge Denison forcefully argued that the settlement agreement between Root and Universal had "completely disposed of the controversy" (C. R. p. 43; Tr. v. I, p. 6).

In answer to an inquiry by the Senior Circuit Judge as to the nature of the application which Judge Denison and his confreres were making, Judge Denison replied (C. R. p. 51-2; Tr. v. I, p. 13):

> "The frank answer to Your Honor's question is I don't know just what should be done. *The Root case, itself, has been settled. As counsel for the Root Company we can't do anything.* As counsel for these other companies against whom the thing is alleged to be an adjudication and which other companies the plaintiff claims were really defendants in this case—as representing those companies we could file a formal application, I suppose."

Immediately after this statement the following colloquy occurred (C. R. p. 52-3; Tr. v. I, p. 14-5):

*Nor, as will appear, has such a controversy arisen since the Court of Appeals purported to assume such jurisdiction.

"Judge Biggs: Judge Denison, in order that we may have this situation formally before us, you do represent certain persons who are directly concerned in the Root Refining case, the two cases to which you have referred, is that correct?

"Mr. Denison: That is part of the truth. We have always denied on account of these other defendants—we have always denied and *we do deny that there was that participation by them in the Root cases that made them really parties, and we can't come in and say they were parties.*

"Judge Biggs: Do you conceive you might have a right to proceed in this matter amicus curiae? What have you to say to that?

"Mr. Denison: We had thought of that, and I would say to that, that such a proceeding is broadly within the general thought of proceedings by amicus curiae, but I know of no precedent for it, and such proceedings ordinarily are applications for a re-argument of the case, itself, and *that very case is out of existence, it has been settled.* That is the complication there. The problem is a difficult one."

In discussing the procedural difficulties, Judge Denison observed (C. R. p. 63; Tr. v. I, p. 24):

"The Root Company has settled this case, *the case is moot.*"

On the same occasion, Mr. von Holst, another of *Amici Curiae*, indicated complete agreement with Judge Denison, saying (C. R. p. 65, 67; Tr. v. I, p. 25, 27):

"On the question of re-argument in so far as it bears on the Root situation, I was in conference with Mr. Hamilton of the Root Company lately, *and they settled their litigation* after long years of costly liti-

gation, and their position, of course, is that they would not want to jeopardize their present position.

*"In other words, the Root Company would not for a moment consent to throwing the whole thing open again and taking their chances on a new adjudication where they might win or they might lose * * *.*

* * * * * * *

"Having entered into a license, the decree is completely superseded; the case has become moot."

In the absence of any controversy between Root and Universal, between what adverse parties could a controversy be said to have existed in the *Root* case?

(b) *Amici Curiae* could not constitute themselves such adverse parties for they had no controversy with petitioner in the *Root* case. As individuals, they had no legally cognizable interest in the *Root* case. Their suggestion that they were bringing the matter to the attention of the court *pro bono publico* (C. R. p. 46-51; Tr. v. I, p. 9-13) is unavailing, for they did not, and indeed could not, claim thereby to create in themselves a legally cognizable adversary position.

(c) They emphasized that they were acting on behalf of certain clients against which petitioner had attempted to assert, in other litigation, that the *Root* judgments were *res adjudicata*. But on this issue they successfully demonstrated that their clients were not bound by those judgments (*Universal-Oil Products Co.* v. *Globe Oil & Refining Co.*, 31 F. Supp. 665) and thus put their clients in the position of complete strangers to the *Root* case. Indeed *Amici Curiae*, in adopting that euphemistic title at the suggestion of Judge Biggs, did so for the very reason that they de-

nied that they represented anyone "directly concerned in the Root Refining case" (C. R. p. 53; Tr. v. I, p. 14), thereby recognizing the complete anonymity of their position.

In any event, whatever the status of *Amici Curiae* was, and whatever its name, they did not seek to acquire, for themselves or their clients, the status of party for they never sought to intervene on behalf of either nor did they otherwise submit themselves to the jurisdiction of the court.

(d) The disclaimer by *Amici Curiae* that they represented anyone having a legal interest in the *Root* case and their failure to assert, in themselves or on behalf of others, an adversary position, are fatal to the jurisdiction of the Court of Appeals, for such jurisdiction cannot be founded upon the claim that they were merely representing the public interest in an effort to clear the good name of that court. Such claim is not sufficient to create a "case" or "controversy" within the meaning of the Constitution.

This Court has consistently held that, where a person has no legally cognizable *private interest* to assert, the juridical power of the federal court can not be invoked. *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70; *New Jersey* v. *Sargent*, 269 U. S. 328; *Massachusetts* v. *Mellon*, 262 U. S. 447; *Fairchild* v. *Hughes*, 258 U. S. 126; *State of Georgia* v. *Stanton*, 6 Wall. 50; *Osborn* v. *U. S. Bank*, 9 Wheat. 738.

The repercussions of this doctrine upon the position of *Amici Curiae* are clearly delineated by the decision in *Fairchild* v. *Hughes, supra*. In that case the plaintiff brought a bill against the Secretary of State praying that the Nineteenth Amendment to the Constitution of the United States be declared unconstitutional and void upon the ground that

the resolutions adopted in the various states were inoperative. This Court dismissed the bill for want of jurisdiction on the ground that no justiciable case or controversy was presented, saying (258 U. S. 126, 129):

> "* * * it is not a case within the meaning of §2 of Article III of the Constitution, which confers judicial power on the federal courts, for no claim of plaintiff is 'brought before the court[s] for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs.'"

Amici Curiae, to the extent that they claim to represent the public interest, are in a position analogous to that of the plaintiff in the *Fairchild* case. Representing no party to the *Root* case, their rights are no greater than the right of any citizen, and the incidental phenomenon of their being seen and heard in this investigation can create no case or controversy, in which the jurisdiction of the Court of Appeals may be invoked.

Since *Amici Curiae* did not set in motion the machinery of arbitrament of a legally justiciable controversy under the Constitution and since, in the absence of adverse parties and the existence of an actual controversy, the Court of Appeals was without jurisdiction to proceed, what then was the function of the proceeding? We submit that it could have been no more than an investigation by the Court of Appeals of its membership and of officers of the court practicing before it.

The order of the Court of Appeals, entered November 26, 1941, by which the Master was appointed, recognized by its very terms the non-juridical nature of the proceeding.

It invested the Master with authority to "examine" and "investigate" and authorized and directed him (C. R. p. 138; Tr. v. I, p. 95),

> "to request the Department of Justice to make available to him as an officer of this court the records, documents and other evidence in the possession of such Department, whether developed by its Bureau of Investigation in its inquiries, or by the prosecuting attorneys of the Department in grand jury inquiries, or otherwise, bearing upon the matters hereby referred to him, and also to request (if such request be necessary) the Attorney General of the United States or the United States District Courts in which the said grand jury proceedings in the Cities of New York and Philadelphia took place, to make available to him as an officer of this court a stenographic transcript of the said proceedings."

As previously shown, the Master himself recognized that the proceeding was extra-legal and that no justiciable controversy existed, for he observed (C. R. p. 177; Tr. v. I, p. 133):

> "I do not think that the *investigation—for that is all it is*—should be conducted strictly according to the rules of evidence in litigation."

We respectfully urge that the investigation, apart from the inherent power of any court to discipline an officer of that court, was no more a judicially cognizable controversy than a Congressional investigation would be. In the case of *In re Pacific Ry. Com'n.*, C. C. N. D. Cal., 32 Fed. 241 (cited and quoted with approval by this Court in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), it appeared that Congress had ordered an investigation of certain railroads

and had authorized the commissioners to seek aid of the federal courts in carrying out their investigation. The commissioners asserted that they were not bound by rules of evidence in the course of their investigation (as the Master did in the proceeding under attack) and received *ex parte* statements and information of every character which they deemed relevant to the inquiry (as the Master did in the proceeding under attack [C. R. p. 144; Tr. v. I, p. 100-1; C. R. p. 145-56; Tr. v. I, p. 102-13; C. R. p. 185-250; Tr. v. VI, p. 2240-2306; C. R. p. 253-4; Tr. v. VIII, p. 3518-9]).

The Circuit Court declined to aid or implement such a proceeding, in which the rules of evidence applicable to a legal court proceeding had been disregarded, Mr. Justice Field (then on circuit) saying (p. 258, 259):

> "The federal courts, under the constitution, cannot be made the aids to any investigation by a commission or a committee into the affairs of any one. If rights are to be protected or wrongs redressed by any investigation, it must be conducted by regular proceedings in the courts of justice *in cases authorized by the constitution.*
>
> * * * * * *
>
> "It cannot be that the courts of the United States can be used in furtherance of investigations in which all rules of evidence may be thus disregarded."

Even if there had existed a controversy in which *Amici Curiae* and petitioner were adverse parties, asserting adverse interests, such controversy would have been wholly separate and apart from any controversy which existed in the *Root* case. Such a controversy could only have been the subject of an original "case" which, if instituted by *Amici Curiae* in the federal courts, must needs have

been commenced in an appropriate district court and not in the appellate Circuit Court of Appeals. By Section 117 of the Judicial Code (28 U.S.C. §212), the Circuit Court of Appeals is vested with "appellate jurisdiction, as hereinafter limited and established". This Court has held that the Circuit Court of Appeals has no original jurisdiction, that its jurisdiction is solely appellate and is "limited and established" by the Judicial Code. *Whitney* v. *Dick*, 202 U. S. 132; *United States* v. *Mayer*, 235 U. S. 55.

Since the Court of Appeals was without jurisdiction, it had no power to make any adjudication against petitioner including the taxation of costs or any other sums against petitioner. This Court has consistently held that where a federal court is without jurisdiction to hear and determine a cause on the merits, it lacks jurisdiction for all purposes, even jurisdiction to award costs to the party successfully asserting lack of jurisdiction. *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640; *Citizens' Bank* v. *Cannon*, 164 U. S. 319; see also *Smyth* v. *Asphalt Belt Ry.*, 267 U. S. 326; *Blacklock* v. *Small*, 127 U. S. 96.

POINT II

THE ORDER OF THE COURT OF APPEALS, BASED UPON AN INVESTIGATION IN WHICH THE FUNDAMENTAL RULES OF EVIDENCE WERE, AT THE COURT'S DIRECTION, WHOLLY DISREGARDED, DEPRIVED THE PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Before anyone stands convicted of bribery of the judiciary, he should have a trial, carefully conducted according to the concepts of due process contemplated by the Constitution. Where, as here, such a serious charge is made, we

respectfully urge that this Court should be especially zealous to protect petitioner's right to a constitutional trial. The proceedings here demonstrate that petitioner has not been fairly tried according to such standards.

On November 26, 1941, the judges of the Circuit Court of Appeals for the Third Circuit, purporting to act as the court, entered an order appointing a Master with authority to "investigate" and to report his findings and conclusions as to whether there was any fraud, corruption, obstruction or distortion of justice invalidating judgments of the Court of Appeals rendered in the *Root* case. The order also directed the Master (C. R. p. 138; Tr. v. I, p. 95):

> "* * * to request the Department of Justice to make available to him as an officer of this court the records, documents and other evidence in the possession of such Department, whether developed by its Bureau of Investigation in its inquiries, or by the prosecuting attorneys of the Department in grand jury inquiries, or otherwise, bearing upon the matters hereby referred to him, and also to request (if such request be necessary) the Attorney General of the United States or the United States District Courts in which the said grand jury proceedings in the Cities of New York and Philadelphia took place, to make available to him as an officer of this court a stenographic transcript of the said proceedings."

The Master, recognizing that the proceeding was merely an investigation,* before taking any testimony and in the

*Thus the Master stated at the second hearing before him (C. R. p. 177; Tr. v. I, p. 133):

> "I do not think that the *investigation—for that is all it is—should be conducted strictly according to the rules of evidence in litigation.*"

absence of *Amici Curiae* and counsel for petitioner, personally examined, pursuant to the above order, all of the records in the possession of the United States Attorney for the Southern District of New York, including, among others, reports of the F. B. I., bank records and *ex parte* statements of Judge Davis, Judge Davis' cousin and the latter's son. He also scrutinized written statements prepared and submitted to the United States Attorney by Judge Davis, his wife and his counsel, grand jury testimony of Davis and Kaufman and "many other reports and statements" (C. R. p. 152-6; Tr. v. I, p. 109-13). The Master indulged in these extra-judicial activities admittedly for the purpose of ascertaining if there was anything contained in the documents which, in *his* opinion, might throw light upon the matters under investigation. Extracts from the minutes of the New York grand jury were made by the Master of *only* those matters "which seem to *me* to be material to the present *investigation*" (C. R. p. 156; Tr. v. I. p. 113), and only such extracts were submitted for the examination of *Amici Curiae* and counsel for petitioner (*ibid.*).

Thereafter, on April 16, 1942, the Master read into the record a list and description of documents, records, grand jury testimony, F.B.I. reports and other writings which he had examined, some of which he never submitted to counsel. At that hearing the Master advised *Amici Curiae* and counsel for petitioner that he had procured a copy of the record of the grand jury sitting in Philadelphia which had investigated the affairs of Judge Davis and Kaufman. He then stated (C.R. p. 156; Tr. v. I, p. 113-4):

> "I have agreed with Judge Biggs that *I* would examine this record, and if *I* found anything in it material to the present inquiry it should be used in this proceeding. If *I* find nothing which seems to *me* to have a bearing on the issues presented in this investigation, I will return the record to the proper parties."

At the conclusion of the hearings, the Master filed a part of the record, a document entitled "Memorandum Made by Master Upon Examining Certain Documents in the Office of the United States Attorney in New York and Containing Extracts from the Testimony of Morgan S. Kaufman and J. Warren Davis before the Grand Jury" (C.R. p. 185-250; Tr. v. VI, p. 2240-2306) although it had not been offered in evidence either by *Amici Curiae* or petitioner. Interspersed throughout the "Memorandum" were running comments by the Master characterizing certain portions of the testimony and summarizing other portions thereof which he deemed unnecessary to set forth in full. The memorandum concluded with the statement "I have given *about all* that has any materiality regarding the Stokley loan"* (C. R. p. 250; Tr. v. VI, p. 2306). The Master also caused to be included in the record of the investigation the testimony of Stokley before the federal grand jury in New York (Tr. v. VI, p. 2306-2487).

The mere recitation of this extraordinary procedure adopted by the Master serves to demonstrate that, once these proceedings ceased to be what they were originally intended to be, namely, an investigation into the probity of the court, and became the foundation for the Master's

*The transaction which was claimed to have constituted the bribe by Kaufman of Judge Davis. Stokley was Davis' cousin.

findings of fact upon which the Court of Appeals might make an adjudication binding upon petitioner, affecting its property rights and judgments, the conduct of the Master in that investigation violated petitioner's constitutional right to due process of law.

This Court has consistently adhered to the fundamental rule, which circuit courts of appeals have followed, that consideration by a tribunal of information which has not been formally introduced as evidence and particularly an *ex parte* and informal exploration by the trier of the facts, deprives a party of its property without due process. *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294; *U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274; *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88; *In re Aughenbaugh*, 3 Cir., 125 F. (2d) 887; *United States* v. *Appalachian Electric Power Co.*, 4 Cir., 107 F. (2d) 769, reversed on other grounds, 311 U. S. 377.

Thus, in *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, *supra*, this Court, in holding that findings of the Interstate Commerce Commission could not be based upon information which might be in the Commission's hands but which had not been formally proved at the hearing, stated (p. 93-4):

> "But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of § 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and,

> even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int., Com. Comm.* v. *Baird*, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, *to inspect documents and to offer evidence in explanation or rebuttal.* In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States* v. *Baltimore & Ohio S. W. R. R.*, 226 U. S. 14."

In *United States* v. *Appalachian Electric Power Co., supra*, the Circuit Court of Appeals held that findings made by the Federal Power Commission in the course of an "investigation" in which the Commission considered official reports, public documents, etc., which were obtained "informally and *ex parte*", could not in any way affect the rights of the defendant. Thus, the court said (p. 792):

> "For the same reasons we do not think that the subsequent declaration or finding of the Commission on October 12, 1932, can be regarded as in any way affecting the rights of the defendant, because it was

made ex parte without notice or hearing. It is not meant to suggest that the Commission at any time intentionally proceeded arbitrarily, or without proper regard to the rights of the Dam Company, or that its proceeding was inappropriate to the 'investigation' directed by the Act; *but only that its finding, to the extent based on information obtained informally and ex parte, and not brought out at the notified hearing where it would be subject to cross-examination and possible refutation, cannot properly be considered as consistent with due process, if sought to be made conclusive on the defendant.* The reasonable assumption would seem to be that the procedure followed was adopted as appropriate to an 'investigation' by the Commission, rather than a 'hearing' with the legal implications thereof. See Norwegian Nitrogen Products Company v. United States, 288 U. S. 294, 317, 53 S. Ct. 350, 77 L. Ed. 796."

The order of the Court of Appeals, purporting to affect petitioner's property rights, was based upon an investigation, similar in nature to those which the administrative bodies had conducted, in that the Master "informally and *ex parte*" obtained information and perused documents which were not formally introduced in evidence. Such a procedure, under the *rationale* of the foregoing cases, is a deprivation of petitioner's property without due process of law. Due process demands that everything considered by the Master should have been made available to petitioner and introduced in an orderly way, so that petitioner might have ample opportunity of refutation and cross-examination. It is no less a deprivation of due process for the Master to have ferreted out "a great mass of pages and many exhibits" (C.R. p. 146; Tr. v. I, p. 102), some sworn,

some unsworn, but all unauthenticated in the evidentiary sense for the purposes of this proceeding, some of which he deemed material and used as evidence and the rest of which he disregarded as immaterial.

It is impossible to prove whether or not information improperly obtained, as in the present proceeding, affected the Master's decision. But it is unnecessary to establish that the Master actually relied upon evidence improperly obtained. This Court recently observed in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, 247, that it is doubtless "wholly impossible accurately to appraise the influence" which improper evidence may have upon the judicial mind.

A fair hearing, under the due process clause of the Fifth Amendment, contemplates that all facts and their sources, known to the Master, "be shown in the record and be open to challenge and opposing evidence. Facts conceivably known to the * * * [Master], but not put in evidence so as to permit scrutiny and contest, will not support" a binding order. *Crowell* v. *Benson*, 285 U. S. 22, 48.

Petitioner is not here seeking to be relieved by a mere technicality of the just penalty of any fraud of which it has been proven guilty, for we submit that it has not been found guilty of fraud by due process of law.

On the contrary, we believe that in a legally constituted proceeding, where the ordinary rules of evidence were observed and where the parties charging fraud were obliged to prove that charge by a fair preponderance of the evidence and, above all, where the trier of the fact would not have access to sources of information denied to your petitioner,—no finding of fraud or corruption touching petitioner would be made. We respectfully submit that peti-

tioner is entitled, before the odium of corrupting the judiciary and all the concomitants thereof attach to it, to have a plenary trial of the issues in accordance with established legal principles. It is prepared to litigate these issues upon the merits in accordance with "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" (*Morgan* v. *United States*, 304 U. S. 1, 19) and to be bound by the outcome thereof. To the time of the writing of this brief, it has not had its constitutional day in court.

POINT III

IN ANY EVENT *AMICI CURIAE* ARE NOT ENTITLED TO THE COSTS, FEES AND ALLOWANCES AWARDED BY THE COURT OF APPEALS.

A. In awarding the costs, fees and allowances, the Court of Appeals disregarded the limitations placed upon it by statute, the order of this Court and its own rules.

By Act of February 19, 1897, 28 Stat. 536, c. 263 (28 U.S.C. §543), Congress granted to this Court the power to limit the costs and fees which might be "fixed and established" by each Circuit Court of Appeals.* Pursuant

*This Act was amended by Act of September 27, 1944, 58 Stat. 743 (28 U. S. C. § 543), the first section of which provides that:

> "The costs and fees to be charged and collected in each circuit court of appeals and in the United States Circuit Court of Appeals for the District of Columbia, shall be prescribed from time to time by the Judicial Conference of Senior Circuit Judges. Such costs and fees shall be reasonable and uniform in all the circuits."

thereto, this Court promulgated an order, effective March 15, 1941, establishing a table of fees and costs which might not be exceeded by the respective Circuit Courts of Appeals. In conformity with such order, Section 8 of Rule 37 of the Rules of the Circuit Court of Appeals for the Third Circuit specifies the "fees and costs" which have been established by that court.*

Section 2 of the Act of September 27, 1944, provides:

> "Until the effective date of action of the Judicial Conference of Senior Circuit Judges pursuant to Section 1 of this Act the table of fees and costs now in effect in the circuit courts of appeals shall remain in force."

We have been advised that to date no action of the Judicial Conference of the Senior Circuit Judges has become effective and, therefore, the table of fees and costs provided for by Section 8 of Rule 37 of the Circuit Court of Appeals for the Third Circuit is still in effect.

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*The rule provides:

> "SCHEDULE OF COSTS. In pursuance of the Act of March 3, 1891, as amended by the Act of February 19, 1897, (28 USC § 543) and of the order of the Supreme Court of January 10, 1898, as amended February 19, 1898, and March 10, 1941, and of section 824, Revised Statutes, as amended (28 USC § 572), the following table of fees and costs is established for this court:

Docketing a case and filing the record	$ 5.00
Entering an appearance	.25
Transferring a case to the printed calendar	1.00
Entering a continuance	
Filing a motion, order or other paper	.25
Entering any rule, or making or copying any record or other paper, for each 100 words	.20
Entering a judgment or decree	1.00
Every search of the records of the court and certifying the same	1.00
Affixing a certificate and a seal to any paper	1.00

The table of costs and fees provided for in Section 8 of Rule 37 of the Court of Appeals for the Third Circuit is in conformity with the order of this Court dated March 15, 1941, and the Act of August 3, 1935, 49 Stat. 513 (28 U. S. C. § 572), the latter providing for proctor's fees on appeals in admiralty. The costs, fees and allowances granted to *Amici Curiae* by the order of December 29, 1944 (C. R. p. 392-3, 360-384; Tr. v. IX, p. 3692-3, 3663-84), are not of the nature of the allowable fees and costs specified in said order of this Court, or in Section 8 of Rule 37 of the Rules of the Circuit Court of Appeals for the Third

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Receiving, keeping, and paying money, in pursuance of any statute or order of court, 1% on the amount so received, kept and paid	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index	.25
Making a manuscript copy of the record, when required by the rules, for each 100 words (but nothing in addition for supervising the printing)	.20
Issuing a mandate, or other process	5.00
Filing briefs, for each party appearing	5.00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed $5 in the whole for any copy)	1.00
Attorney's docket fee	20.00
Proctor's docket fee:	
Where the amount involved is not over $1,000.	20.00
Where the amount involved is from $1,000 to $5,000	50.00
Where the amount involved is over $5,000	100.00

[Provided that the charge for any single record and index shall not exceed $500.00.]"

Circuit. Whatever might be the equitable power of a federal *district* court to grant to counsel, in certain limited cases, costs, fees and allowances, the foregoing statutes, order and rule of court constitute an absolute limitation upon the power of the Circuit Court of Appeals to grant any costs or fees other than those provided therein.

B. Regardless of the limitation upon the power of the Court of Appeals to award fees, costs and allowances, its action is unsupported by the decisions.

Even if the Circuit Court of Appeals were not bound by statute, the order of this Court or its own rules, the allowances, costs and fees granted by it to *Amici Curiae* would be unwarranted.

The bulk of the items allowed by the order of December 29, 1944, consists of counsel fees and expenses. Other than the nominal attorney's fee provided by the fee bill statutes, such counsel fees and expenses are never charged against a party to the litigation. *Rude* v. *Buchhalter*, 286 U. S. 451; *The Baltimore*, 8 Wall. 377; *Huff* v. *Bidwell*, 5 Cir., 195 Fed. 430; *Continental & Commercial, Etc., Bank* v. *Continental S. Co.*, 8 Cir., 32 F. (2d) 740; *Standard Lumber Co.* v. *Interstate Trust Co.*, 5 Cir., 82 F. (2d) 346, *cert. den.* 299 U. S. 545; *Doddridge County Oil & Gas Co.* v. *Smith*, N. D. W. Va., 173 Fed. 386; *Morgan* v. *Grass Fibre Pulp & Paper Corporation*, S. D. Fla., 11 F. (2d) 431.

It is true that in certain cases equitable considerations require the allowance by a federal district court of costs "as between solicitor and client" rather than merely costs as between party and party.

Common examples of such cases are those involving the foreclosure of mortgages (*e.g. Dodge* v. *Tulleys*, 144 U. S. 451), receiverships (*e.g. Stuart* v. *Boulware*, 133 U. S. 78; *Presidio Mining Co.* v. *Overton*, 9 Cir., 286 Fed. 848), suits by stockholders to preserve the property rights of their corporation (*e.g. Hutchinson Box Board & Paper Co.* v. *Van Horn*, 8 Cir., 299 Fed. 424; *Hodgman* v. *Atlantic Refining Co.*, D. Del., 8 F. (2d) 777), or suits by one or more creditors to preserve and bring into court for administration a fund in which they are interested (*e.g. Trustees* v. *Greenough*, 105 U. S. 527; *Brown* v. *Pennsylvania R. Co.*, 3 Cir., 250 Fed. 513, *cert. den.* 248 U. S. 558; *Tevander* v. *Ruysdael*, 7 Cir., 299 Fed. 746; *Standard Lumber Co.* v. *Interstate Trust Co.*, 5 Cir., 82 F. (2d) 346, *cert. den.* 299 U. S. 545; *American Water Works & Elec. Co.* v. *Allegheny T. Co.*, W. D. Pa., 43 F. Supp. 103, *aff'd* 3 Cir., 125 F. (2d) 551). But in all these classes of cases the common factor is the creation or the preservation of a fund by a party to the litigation for the benefit of himself and all others similarly situated.

In such cases, moreover, the cost allowances are a charge, not against the adverse party, but upon the fund. *Standard Lumber Co.* v. *Interstate Trust Co.*, 82 F. (2d) 346. In that case the court observed (p. 350):

> "In addition to the fundamental error of this allowance [of counsel fees] that the case was not a proper one for it, *there was error also in allowing it as costs against defendants, instead of, if it could have been properly allowed, out of the fund preserved. The result of the allowance in this case has been to charge these fees not upon the fund, but upon defendants. There is no warrant in law for such charge.*"

In this investigation *Amici Curiae* created no fund. They benefited no one but their own clients. Certainly they cannot be said to have benefited petitioner, its stockholders or its creditors. The results of their efforts have neither created nor preserved any fund upon which their expenses and compensation can be made a charge.

In this application, *Amici Curiae* seeks reimbursement to themselves, and indirectly to their clients, of the expenses of an investigation which they instituted for the benefit of their clients, not out of a fund which they either created or preserved, but out of the corporate assets of petitioner belonging to its stockholders and creditors. There is no basis in law or in equity for such a charge.

Furthermore, in the absence of express statutory enactment or rule of court governing the propriety of the allowance of the costs, fees and compensation in question, the practice of the state courts of Pennsylvania would be pertinent. This Court, in *Ex parte Peterson*, 253 U. S. 300, 316, said:

> "In *Hathaway* v. *Roach*, p. 67 [2 Woodb. and M. 63], it is said to have been the usage of the federal courts 'to conform to the state laws as to costs, when no express provision has been made and is in force by any act of Congress in relation to any particular item, or when no general rule of court exists on this subject'."

Thus, even if the power of the Court of Appeals to grant costs and allowances were not limited by statute and rule of court, the court below would have been unwarranted in its action in the light of the decisions of the state courts of Pennsylvania.

Those courts have refused to assess costs and counsel fees against an adversary party except in those classes of cases where equitable considerations require that costs as between solicitor and client be allowed. The exceptions recognized by the Pennsylvania courts are those just discussed. *Hempstead et al.* v. *Meadville Theo. S., aplnts.*, 286 Pa. 493, 134 Atl. 103; *Hackett and Hackett* v. *Hackett, et al.*, 104 Pa. Super. 353, 159 Atl. 226.

CONCLUSION

THE ORDER OF THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED ON DECEMBER 29, 1944. SHOULD BE VACATED AND THE PROCEEDINGS DISMISSED.

Respectfully submitted,

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